

ORIGINAL

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UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII  
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Attorneys for Plaintiff  
WILDEARTH GUARDIANS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WILDEARTH GUARDIANS,

) CIVIL NO. CV 10 00003 DAE

Plaintiff,

) COMPLAINT;  
))  
)) SUMMONS

vs.

KEN SALAZAR, U.S. SECRETARY  
OF THE INTERIOR,

Defendant.

KSC

COMPLAINT

Plaintiff, WILDEARTH GUARDIANS, by and through its attorneys,  
Cruise & Yost, LLLC, brings the following complaint against Defendant  
KEN SALAZAR, U.S. SECRETARY OF THE INTERIOR and alleges and  
avers as follows:

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## INTRODUCTION

1. Defendant, Ken Salazar, U.S. Secretary of the Interior, (the “Secretary” or alternatively, the U.S. Fish and Wildlife Service, or “FWS,” signifying the federal agency to which he has delegated his responsibilities) is violating the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, by failing to publish a final determination on the Secretary's proposed rule to list 48 species from Kauai as Endangered Species and to designate their critical habitat. The ESA required the Secretary to publish a final determination on his proposed rule in the Federal Register on or before October 21, 2009. The Secretary's duty to take this action is mandatory and non-discretionary. Plaintiff, WildEarth Guardians (“Guardians”) files this suit and seeks to compel the Secretary to follow the law.

## JURISDICTION and VENUE

2. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540(c) & (g) (action arising under the ESA and citizen suit provision). As required by 16 U.S.C. § 1540(g)(2)(C), Guardians furnished the Secretary with written notice of his violation of the ESA more than sixty days ago.

3. Guardians has formally notified the Secretary of its demand that he finalize the proposed rules at issue, but the Secretary has failed and

continues to fail to do so. Accordingly, an actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201 (Declaratory Judgment Act).

4. Venue lies in this judicial district pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e).

#### PARTIES

5. Plaintiff, WILDEARTH GUARDIANS, is a non-profit corporation. Guardians brings this action on behalf of itself and its adversely affected members and staff. As a central part of its mission, Guardians strives to protect rare and vanishing species. To this end Guardians maintains an active biodiversity protection program that frequently seeks to force the Secretary to protect all deserving species under the ESA. Guardians has more than 4,500 members and supporters. Guardians' members and staff regularly use the Island of Kauai, including the habitat and potential habitat of the 48 species at issue, for recreational, scientific, and educational activities as well as other forms of aesthetic enjoyment. Guardians' members and staff derive scientific, recreational, conservation, and aesthetic benefits from the existence of the 48 Kauai species in the wild. The Secretary's failure to make a final decision on the proposed rule to list the 48 Kauai species and designate their critical habitat

is leading to the further decline of these species and their habitat.

Accordingly, the above described interests of Guardians' members and staff have been, are being, and unless the Court grants the requested relief will continue to be adversely affected and irreparably injured by the Secretary's continued inaction and failure to comply with the law.

6. Defendant, KEN SALAZAR, is the U.S. Secretary of the Interior. He is sued in his official capacity. The Secretary is the federal official in whom the ESA vests responsibility for listing deserving species and designating their critical habitat. The Secretary has delegated his authority in this case to the U.S. Fish and Wildlife Service ("FWS"), an agency within the U.S. Department of the Interior.

#### THE ENDANGERED SPECIES ACT

7. The ESA is a federal statute whose purpose is to conserve endangered and threatened species and the ecosystems upon which these species depend. 16 U.S.C. § 1531(b). To this end, the ESA requires the Secretary to list species of plants and animals that are facing extinction as "threatened" or as "endangered." 16 U.S.C. § 1533. A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A species is "threatened" if it "is likely to become an endangered species within the foreseeable future

throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

8. Before the ESA can protect a species, or that species' habitat, that species must be “listed” as either threatened or endangered under the Act. 16 U.S.C. § 1533. The listing process is the essential first step in the ESA's system of species protection and recovery.

9. Any person can begin the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(a).

10. Upon receipt of a petition to list a species, the Secretary has 90 days to review the information submitted and make a finding as to whether that petition presents substantial information indicating that the petitioned action may be warranted. 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). If the petition is found to present substantial information, the Secretary then publishes a “90 day finding and commencement of status review” and directs FWS to begin reviewing the status of the species. 16 U.S.C. § 1533(b)(3)(A).

11. After a positive 90-day finding has been made, the Secretary has twelve months from the date that the petition was received to make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently

precluded by other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). The second determination is known as the “twelve-month finding.”

12. If the Secretary finds that the listing of a species is warranted, the Secretary must then publish, in the Federal Register, a proposed rule to list such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

13. Within one year of the publication of a proposed rule to list a species, the ESA requires the Secretary to render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A).

14. At this point, the Secretary may list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i).

15. Concurrently with a final determination to list a species, the Secretary must render a final decision concerning the designation of critical habitat for the species to the maximum extent prudent and determinable. 16 U.S.C. §§ 1533(a)(3) & 1533(b)(6)(C). However, if certain conditions are met, the Secretary may extend the deadline to issue a final regulation concerning critical habitat for an additional year. 16 U.S.C. §

1533(b)(6)(C)(ii).

THE 48 KAUAI SPECIES

16. Hawai‘i is well known for its endemic and rare flora and fauna. Within Hawai‘i, the greatest diversity and number of endemic species are found on Kauai. The 48 Kauai species at issue in this case represent the rarest of the rare and include 45 plants, 2 birds, and a picture-wing fly found nowhere else on earth. 73 Fed. Reg. 62591. These 48 species represent, and depend upon, six different ecosystems found on Kauai: lowland mesic, lowland wet, montane mesic, montane wet, dry cliff, and wet cliff. The 48 species (in alphabetical order, plants listed first) are:

- a. *Astelia waialealae* (painiu)
- b. *Canavalia napaliensis* (awikiwiki)
- c. *Chamaesyce eleanoriae* (akoko)
- d. *Chamaesyce remyi* var. *kauaiensis* (akoko)
- e. *Chamaesyce remyi* var. *remyi* (akoko)
- f. *Charpentiera densiflora* (papala)
- g. *Cyanea dolichopoda* (haha)
- h. *Cyanea elealeensis* (haha)
- i. *Cyanea kolekoleensis* (haha)
- j. *Cyanea kuhihewa* (haha)

- k. *Cyrtandra oenobarba* (haiwale)
- l. *Cyrtandra paliku* (haiwale)
- m. *Diellia mannii*
- n. *Doryopteris angelica*
- o. *Dryopteris crinalis* var. *podosorus*
- p. *Dubautia imbricata* ssp. *imbricata* (naenae)
- q. *Dubautia kalalauensis* (naenae)
- r. *Dubautia kenwoodii* (naenae)
- s. *Dubautia plantaginea* ssp. *magnifolia* (naenae)
- t. *Dubautia waialealae* (naenae)
- u. *Geranium kauaiense* (nohoanu)
- v. *Keysseria erici*
- w. *Keysseria heleneae*
- x. *Labordia helleri* (kamakahala)
- y. *Labordia pumila* (kamakahala)
- z. *Lysimachia daphnoides* (lehua makanoe)
- aa. *Lysimachia iniki*
- bb. *Lysimachia pendens*
- cc. *Lysimachia scopulensis*
- dd. *Lysimachia venosa*

- ee. *Melicope degeneri* (alani)
- ff. *Melicope paniculata* (alani)
- gg. *Melicope puberula* (alani)
- hh. *Myrsine knudsenii* (kolea)
- ii. *Myrsine mezii* (kolea)
- jj. *Phyllostegia renovans*
- kk. *Pittosporum napaliense* (hoawa)
- ll. *Platydesma rostrata* (pilo kea lau lii)
- mm. *Pritchardia hardyi* (loulu)
- nn. *Psychotria grandiflora* (kopiko)
- oo. *Psychotria hobdyi* (kopiko)
- pp. *Schiedea attenuata*
- qq. *Stenogyne kealiae*
- rr. *Tetraplasandra bisattenuata* (ohe ohe)
- ss. *Tetraplasandra flynnii* (ohe ohe)
- tt. Kauai creeper (*Oreomystis bairdi*)
- uu. Kauai akepa (*Loxops caeruleirostris*)
- vv. *Drosophila attigua* (a Hawaiian picture-wing fly)

73 Fed. Reg. 62592.

17. Many of the 48 species have been considered candidates for

listing by FWS for years. There is no scientific dispute that the 48 species meet the definition of endangered species under the Act and should be protected by the ESA. Accordingly, after substantial delay, on October 21, 2008, FWS published a proposed rule in the Federal Register proposing to list all 48 species as endangered. 73 Fed. Reg. 62592. Additionally, on October 21, 2008, FWS proposed critical habitat designation for 47 of the 48 species. Id. FWS determined that it was not prudent to designate critical habitat for *Pritchardia hardyi* because this species was at risk from collection and vandalism and location information provided through a critical habitat designation could increase these risks. Id.

18. The publication of the proposed rule on October 21, 2008 triggered the Secretary's mandatory duty to take further action within one year. 16 U.S.C. § 1533(b)(6). The Secretary has not availed himself of a potential six-month extension of time for cases of scientific uncertainty. See 16 U.S.C. § 1533(b)(6)(B). There is no scientific uncertainty concerning the endangered status of any of the 48 species.

19. On October 22, 2009, over a year after the Secretary's proposed listing rule for the 48 species, Guardians' Wildlife Program Director, Ms. Nicole Rosmarino, PhD., contacted the FWS's species listing chief, Mr. Douglas Krofta by e-mail. Ms. Rosmarino inquired why FWS had failed to

finalize the proposed listing of the 48 species within one year of the proposed rule.

20. On October 26, 2009, Guardians sent the Secretary and FWS a written notice of its intent to sue to enforce the one-year mandatory deadline if the Secretary did not immediately list the 48 species. According to certified mail receipts, the Secretary and FWS received Guardians' notice of intent to sue letter on November 2, 2009.

21. On October 29, 2009, Mr. Krofta, FWS Listing Chief, left Ms. Rosmarino of Guardians a telephone message indicating a final listing determination for the 48 Kauai species would be forthcoming in two weeks. Ms. Rosmarino thanked Mr. Krofta for his telephone message by e-mail dated November 5, 2009.

22. To date, the Secretary has failed to finalize or withdraw his proposed rule to list the 48 Kauai species as endangered. See 16 U.S.C. § 1533(b)(6)(A) & (B). Additionally, the Secretary has failed to render a final critical habitat decision for the 48 Kauai species. See 16 U.S.C. § 1533(b)(6)(C).

**FIRST CLAIM FOR RELIEF**

(Final Listing Determinations)

23. Each and every allegation set forth in this Complaint is

incorporated herein by reference.

24. The Secretary has failed to make a final decision on his proposed rule to list 48 Kauai species as endangered within one-year of publishing the proposed rule. Accordingly, the Secretary is in violation of Section 4(b)(6) of the ESA, 16 U.S.C. § 1533(b)(6) for failure to perform this non-discretionary duty.

**SECOND CLAIM FOR RELIEF**

(Final Critical Habitat Determinations)

25. Each and every allegation set forth in this Complaint is incorporated herein by reference.

26. The Secretary has failed to make a final critical habitat designation for the 48 Kauai species concurrently with taking final action on the listing proposal. Accordingly, the Secretary is in violation of Section 4(b)(6) of the ESA, 16 U.S.C. § 1533(b)(6) for failure to perform this non-discretionary duty.

**REQUEST FOR RELIEF**

WHEREFORE, Guardians respectfully requests the Court to enter judgment providing the following relief:

(A) A declaratory judgment that the Secretary is in violation of his mandatory duty under the ESA to make, and to publish in the Federal

Register, a final determination regarding his proposed rule to list the 48 Kauai species as endangered;

(B) A declaratory judgment that the Secretary is in violation of his mandatory duty under the ESA to make, and to publish in the Federal Register, a final determination regarding the designation of critical habitat for the 48 Kauai species;

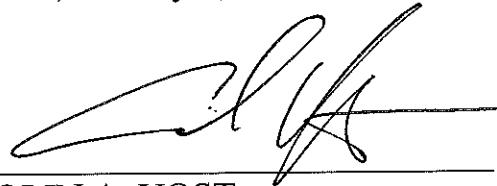
(C) Preliminary and permanent injunctive relief compelling the Secretary to publish in the Federal Register a final rule on the proposal to list the 48 Kauai species as endangered;

(D) Preliminary and permanent injunctive relief compelling the Secretary to publish in the Federal Register a final rule regarding the determination of critical habitat for the 48 Kauai species.

(E) An order awarding Guardians its costs of litigation, including reasonable attorneys' fees; and

(F) Provide such other relief as the Court deems just and proper.

DATED: Honolulu, Hawai'i, January 4, 2009.



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COLIN A. YOST

Attorney for Plaintiff  
WILDEARTH GUARDIANS